88-404

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROGER BRENT DAVIS,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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QUESTIONS PRESENTED

(1) Does N.R.S. 175.552, as construed by the Supreme Court of Nevada, violate the Due Process Clause of the Fourteenth Amendment?

(2) Does N.R.S. 175.552, as construed by the Supreme Court of Nevada, violate the Equal Protection Clause of the Fourteenth Amendment by vesting the prosecutor with the power to force a defendant to elect between his constitutional rights?

PARTIES

The caption of the case in this Court contains the names of all the parties to the instant Petition.

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THE OPINION BELOW

The opinion of the Supreme Court of Nevada has yet to be reported. It is reproduced in its entirety and is attached hereto as Appendix A. The opinion may be cited as *Davis v. State*, ____P.2d____, slip op. no. 17744 (Nev., delivered July 6, 1988).

JURISDICTION OF THIS COURT

The Supreme Court of Nevada entered its Opinion and Judgment on July 6, 1988. No motion for rehearing was filed. Pursuant to Supreme Court Rule 20.4, this Petition is timely filed. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. sec. 1257(2) and Supreme Court Rule 17.1(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "Sec.1: No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person or life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of laws."

N.R.S. 175.552 is referred to in this Petition and is reproduced as Appendix B herein.

STATEMENT OF THE CASE

Petitioner, Roger Brent Davis, was charged with first degree murder with the use of a deadly weapon in the death of his girlfriend. The charge carried a possible sentence of death, however, the district attorney elected not to seek the death penalty. Prior to trial, defense counsel requested a separate penalty hearing, pursuant to N.R.S. 175.552. The trial judge denied Defendant's request, despite that fact that the prosecution had no objection to a bifurcated proceeding, concluding that such a proceeding would be too costly and time consuming.

At trial, both the guilt and punishment issues were put to the jury at the same time. The evidence adduced at trial demonstrated that Petitioner shot his girlfriend in the head as she lay in the cab of his pickup truck, killing her instantly. The theory of defense at trial was that the victim had been despondent for a period of time and, as a result, had committed suicide. In light of their chosen strategy,[1] defense counsel elected not to put on any evidence in mitigation out of fear of jeopardizing chances of winning an acquittal. Accordingly,

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[1]This choice of strategy was necessitated by prior statements of Petitioner at or near the time of the crime. Petitioner had consistently stuck with this explanation.

Petitioner *did not take the stand in his own defense.* The jury returned a verdict of guilty and sentenced Petitioner to life sentences without the possibility of parole on both the first degree murder count and the count alleging use of a deadly weapon.

The trial court's denial of a separate punishment hearing was upheld on appeal to the Supreme Court of Nevada. The basis for that decision being *McCabe v. State of Nevada*, 655 P.2d 536 (Nev. 1982), in which the Nevada Supreme Court, despite the plain wording of the statute, interpreted N.R.S. 175.552 as mandating bifurcated trials only in those cases in which the state has elected to seek the death penalty. N.R.S. 175.552 states, in pertinent part:

> Upon a finding that a defendant is guilty of murder of the first degree, *the court shall conduct a separate penalty hearing* to determine whether the defendant shall be sentenced to death or to life imprisonment with or without the possibility of parole. . .(emphasis added).

(Please see Appendix B for the balance of the statute).

REASONS FOR GRANTING THE WRIT

1. Petitioner has drawn into question the validity of N.R.S. 175.552 on the grounds that the law is violative of due process and equal protection, pursuant to the Fourteenth Amendment to the United States Constitution, and the decision of the Nevada Supreme Court is in favor of the statute's validity. Under these circumstances, this Honorable Court should grant review of the issues presented by Petitioner.

2. The decision of the Nevada Supreme Court is in conflict with the plain wording of the statute, which states, in pertinent part:

> Upon a finding that a defendant is guilty of murder of the first degree, the court *shall* conduct a separate penalty hearing to determine whether the defendant shall be sentenced to death or to life imprisonment *with or without the possibility of parole*...(emphasis added).

3. It cannot be denied that a sentence of life without the possibility of parole is a severe sanction. In Nevada, a sentence of life imprisonment *with* the possibility of parole opens the door for parole eligibility when a minimum of ten years have been served. In contrast, a sentence of life *without* the possibility of parole means just what it says — the defendant will spend the rest of his life behind bars. In *Furman v. Georgia*, 408 U.S. 238 (1972), this Court stated:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. 408 U.S. at 306; *see also, Gardner v. Florida*, 430 U.S. 349, 360 (1977) ("... the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different ..."). Life without parole bears similar attributes in that it too rejects rehabilitation of the convict as a goal of the penal system. Indeed, this Court must consider that although the penalty of death is different in kind, to many individuals death would be preferable to spending every second, minute, hour, day, week, month, year and decade deprived of liberty and contact with free society.[2]

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[2]Just one example is the case of Gary Gilmore. Mr. Gilmore preferred the quickness of the firing squad over the eternity of life behind bars.

4 The possibility of pardon by the executive branch does not ameliorate the harshness of a sentence of life without parole. In *Solem v. Helm*, 463 U.S. 277 (1983), this Court specifically rejected the notion that the possibility of executive clemency was the functional equivalent of parole. The Court stated:

> As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A governor may commute a sentence at any time for any reason without reference to any standards. We explicitly have recognized the distinction between parole and commutation in our prior cases. . . "Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals . . . there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." (citations omitted).

Id. at 300. Indeed, commutation is equally likely whether the sentence is death or life without parole.

5. While this Court has reserved the question of the constitutionality of sentences of life without the possibility of parole,[3] Petitioner does not ground this challenge in the Eighth

[3]*See, Solem v. Helm, supra,* wherein the Court stated: "We raise no question as to the general validity of sentences without the possibility of

Amendment.[4] Petitioner predicates this attack on the constitutionality of N.R.S. 175.552 on the basis of denial of due process. It is Petitioner's contention that the guarantee of procedural due process embodied in the Fourteenth Amendment can only be assured by use of a bifurcated proceeding. In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court expressed a preference for bifurcated proceedings:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasonable determination...by a jury of people who never before have made a sentencing decision.
>
> Jury sentencing has been considered desirable... But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determina-

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parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this respondent violates the Eighth Amendment." *Id.* 463 U.S. at 297, n.24.

[4]Petitioner will, if the Court so requests, brief the issue of life without the possibility of parole being cruel and unusual within the meaning of the Eighth Amendment. As this Court has noted, a punishment is disproportionate "if it (1) *makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering;* or (2) is grossly out of proportion to the severity of the crime. *A punishment might fail the test on either ground.*" *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Lockett v. Ohio*, 438 U.S. 586, 624 (1978) (Marshall, J., concurring).

> tion of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure — one in which the question of sentence is not considered until the determination of guilt has been made — is the best answer. . .. "Trial lawyers have understandably little confidence in a solution that admits the evidence and trusts to an instruction to the jury that it should be considered only in determining the penalty and disregarded in assessing guilt."
>
> "...The obvious solution...is to bifurcate the proceeding, abiding strictly by the rules of evidence until and unless there is a conviction, but once guilt has been determined opening the record to the further information that is relevant to sentence. This is the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing sentence."(citations and notes omitted)(emphasis in original).
>
> *Id.* at 190-91.

6. The failure to hold a separate penalty hearing has resulted in the imposition of a sentence that is arbitrary and capricious. A sentence of life without parole, just as a sentence of death, must be based on reason. This Court's decision in *Furman v. Georgia, supra,* demonstrated that sentencing requires measured consistent application and fairness to the accused. As this Court stated in *Gardner v. Florida, supra:*

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the senten-

> cing is a critical stage of the criminal proceeding... The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to particular result of the sentencing process. (citations omitted).

Id. 430 U.S. at 358.

7. In the case at bar, defendant was faced with an unacceptable choice; either argue for acquittal without presenting mitigating evidence and thereby run the chance of a finding of guilty and a sentence of life without the possibility of parole, or forego his constitutional right not to testify on the ultimate issue and present evidence in mitigation of punishment during the guilt/innocence phase, despite the fact that such evidence is completely inapposite to the theory of defense and thereby compromise his chances of winning an acquittal. A statute that requires a defendant to choose one constitutional right over another corrupts both rights and is, therefore, unconstitutional. *Simmons v. United States*, 390 U.S. 377 (1968); *United States v. Jackson*, 390 U.S. 570 (1968).

8. The decision of the Nevada Supreme Court is in conflict with the precedent of this Honorable Court, in that the Nevada Supreme Court's interpretation of the statute denies the opportunity for consideration of individualized factors in making the sentencing determination. In *Lockett v. Ohio*, 438 U.S. 586 (1978), this Court stated:

> We begin by recognizing that the concept of individualized sentences in criminal cases generally, although not constitutionally required has long been accepted in this country. Consistent with that concept, sentencing judges traditionally have taken a wide range of factors into account . . . And where

> sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant — *if not essential* — [to the] selection of an appropriate sentence . . ." (citations omitted) (emphasis in original).

Id. at 602; *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1981); *see also, Skipper v. South Carolina*, 476 U.S. 1 (1986) (requirement that jury consider all relevant factors in assessing punishment necessitated consideration of defendant's good behavior in jail); *Gregg v. Georgia*, 428 U.S. 153 (1976) ("It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner.").

9. The Nevada Supreme Court's decision denies the Petitioner his right to be heard. In *Ford v. Wainwright*, 477 U.S.____, 106 S.Ct.____, 91 L.Ed.2d 335 (1986), this Court stated: "[t]he fundamental requisite of due process of law is the opportunity to be heard...we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate." *Id.* 91 L.Ed.2d at 349. The case at bar is analogous. The jury made its determination with no evidence in mitigation of punishment, with no instruction from the court, without counsel's argument on punishment and without a separate penalty hearing. Under these circumstances, Petitioner was denied due process. *Skipper v. South Carolina, supra; Gardner v. Florida, supra.*

10. The statute, as interpreted by the Supreme Court of Nevada, denies equal protection under the Fourteenth Amendment, in that it does not accord all defendants accused of first

degree murder with the same protections. Whereas one citizen may be given the opportunity to be heard in a separate penalty hearing, a citizen such as Petitioner, standing accused of the same crime, was forced to chose between his constitutional rights.[5] The effect of this interpretation is to give the prosecutor discretion to deny a defendant a bifurcated trial. This is an area in which the legislature should have exclusive control. While Petitioner recognizes that a prosecutor may legitimately make choices as to which offense to charge, and thereby impact the possible sentence, it is impermissible to allow a prosecutor to force a defendant to elect between his constitutional rights.

This distinction is invalid under the Constitution as it is not supported by any ascertainable legitimate state interest. The justification of the trial court, that granting a separate hearing would be too costly and time-consuming has been rejected by this Court.

> We think the likelihood of significant delay is overstated because we must presume that reports prepared by professional probation officers...are generally reliable. In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding disputed materials. Or if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death.

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[5]It seems ironic to Petitioner that he would have benefitted if the state had sought the death penalty in that he would have been accorded a separate penalty hearing in which he could have taken the stand and argued facts inconsistent with his theory of defense without fear of jeopardizing his chances of acquittal.

Gardner, supra, 430 U.S. at 359-60. Similarly, the difference between life with or without parole merits the same consideration, particularly where, as here, the presentence report had already been prepared.

CONCLUSION

This Honorable Court should grant the instant Petition to rectify the deprivation of due process and equal protection created by the Nevada Supreme Court's interpretation of N.R.S. 175.552. The construction given to this statute impacts a substantial number of criminal defendants whose request for a remedy has been denied by the highest court of their state. Considering that the deprivation of rights secured by the United States Constitution has been wrought by a state court upholding the validity of its own statute, intervention is important, and this Honorable Court should give both parties a chance to fully brief these issues.

Respectfully Submitted,

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APPENDIX A

OPINION

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT BRENT DAVIS,	)	
Appellant,	)	No. 17744
vs.	)	
THE STATE OF NEVADA,	)	
Respondent.	)	
	)	

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction entered upon a jury verdict, of one count of first-degree murder with the use of a deadly weapon and the imposition of two consecutive life sentences without the possibility of parole.

The evidence adduced at appellant's trial demonstrated that appellant shot his girlfriend in the head as she lay in the cab of appellant's truck. On appeal, appellant raises numerous assignments of error.

Appellant first asserts that N.R.S. 175.552 requires the district court to conduct a separate penalty hearing whenever a defendant is convicted of murder in the first degree. Appellant notes that the prosecution had no objection to the allowance of a separate penalty hearing and that a trial of both the guilt and penalty issues at the same time put defense counsel in a position of arguing contradictory circumstances of mitigation and innocence. Because defense counsel failed to proffer mitigating evidence or to argue the need for clemen-

cy, appellant contends that he was denied the benefit of counsel. Appellant also argues that individuals against whom the death penalty is sought have the benefit of presenting mitigating circumstances in a separate penalty hearing, even if the death penalty is not imposed. Appellant argues that he is similarly situated and that he was deprived of the same opportunity. Therefore, appellant contends that the district court erred when it denied his request for a separate penalty hearing below.

In the instant case, however, the state did not seek the death penalty below. In *McCabe v. State*, 98 Nev. 604, 655 P.2d 536 (1982), this court held that the district courts are not obligated to conduct a separate penalty hearing in cases where the defendant cannot be sentenced to death. Furthermore, appellant has failed to cite any authority for the proposition that the denial of a separate sentencing hearing under the circumstances of this case deprives a defendant of his rights under the equal protection clause and the sixth amendment to the United States Constitution. Therefore, we conclude that the district court did not err when it denied appellant's request for a separate sentencing hearing.

Appellant next contends that the district court erred when it instructed the jury that it "must patiently and conscientiously, without . . . prejudice or sympathy, compare, weigh, and consider all of the facts and circumstances . . ." regarding the case below. We note, however, that appellant failed to object to this instruction below. Therefore, we will not consider this claim of error in this appeal. See *Mercado v. State*, 100 Nev. 535, 688 P.2d 305 (1984).

Appellant also argues that the district court erred when it failed to give the model clemency instruction set forth by this court in *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

This contention is without merit. In *Petrocelli*, this court held that the model clemency instruction must be given "when requested by either the state or the defendant". 101 Nev. at 56, 692 P.2d at 511. In the present case, appellant never requested a jury instruction regarding the possibility of clemency. Therefore, the district court did not err when it elected not to give a clemency instruction to the jury.

Appellant next asserts that the district court erred when it failed to instruct the jury regarding the offense of voluntary manslaughter. We disagree. Specifically, we note that appellant never requested the district court to instruct the jury regarding the elements of voluntary manslaughter. Furthermore, during his trial, appellant argued that the victim committed suicide and, therefore, denied participating in the victim's death. Thus, appellant failed to lay a proper foundation for a voluntary manslaughter instruction. *See, e.g., Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966). Under these circumstances, we conclude that the district court did not err when it failed to instruct the jury regarding the elements of voluntary manslaughter.

Appellant next contends that several instances of alleged prosecutorial misconduct deprived him of a fair trial. In this vein, appellant asserts that the prosecutor commented improperly on appellant's offer, and later refusal, to take a polygraph test. We note, however, that appellant failed to object to the prosecutor's remarks. Furthermore, appellant failed to object to a videotaped interview that was shown to the jury and which contained references to appellant's offer to take the polygraph test. Finally, the evidence of appellant's guilt in this case is overwhelming. Under these circumstances, we conclude that this alleged instance of prosecutorial misconduct does not constitute plain error, and that appellate review is,

therefore, precluded. See *Nevius v. State*, 101 Nev. 238, 247-248, 699 P.2d 1053, 1059 (1985).

Appellant next complains that the prosecutor committed misconduct when he referred to appellant's expert witness as a "hired gun". Again, however, appellant failed to object to this remark below. Therefore, for the same reasons expressed above, we decline to review this claim of error. *See Nevius*, 101 Nev. at 247-48, 699 P.2d at 1059.

Appellant also asserts that the prosecutor committed misconduct when he presented evidence to the jury of appellant's membership in the "Sons of Witches" motorcycle club. We note, however, that appellant's membership in the motorcycle club was relevant because testimony presented to the jury showed that the argument which led to the victim's death arose during a "biker run." The evidence was also relevant to show the possible bias of a defense witness who was also a member of a motorcycle club and who testified that members of motorcycle clubs are obligated to assist each other with their legal problems. Thus, the introduction of evidence of appellant's membership in a motorcycle club did not constitute prosecutorial misconduct.

Appellant further asserts that the prosecutor committed misconduct several times during his closing argument by allegedly expressing his personal belief in appellant's guilt. Although the prosecutor did make one passing comment regarding his opinion of appellant's guilt, he immediately corrected his misstatement. In this case, where overwhelming evidence of appellant's guilt was presented to the jury, we conclude that the prosecutor's remarks, even if they were improper, do not warrant reversal of appellant's conviction. See *Yates v. State*, 103 Nev. 200, 734 P.2d 1252 (1987).

Finally, appellant complains that he was deprived of effective assistance of counsel at his trial. We note, however, that in *Gibbons v. State*, 97 Nev. 520, 634 P.2d 1214 (1981), this court held that claims of ineffective assistance of counsel are properly raised in post-conviction proceedings, and not in a direct appeal. Therefore, we decline to consider appellant's claim of ineffective counsel at this time.

. . .

Appellant's contentions lacking merit, we hereby ORDER this appeal dismissed.[1]

_____, C.J.
Gunderson

_____, J.
Young

_____, J.
Springer

_____, J.
Mowbray

_____, D.J.
Whitehead

cc: Hon. Merlyn H. Hoyt, District Judge
Hon. Brian McKay, Attorney General
Goodman, Terry, Stein & Quintana
Mary Sue Johnson, Clerk

[1]The Honorable Jerry Carr Whitehead, District Judge, was designated by the Governor to sit in the place of the Honorable Thomas L. Steffen, Justice, who voluntarily disqualified himself from participating in this appeal. *See* Nev. Const. art. 6, Section 4.

APPENDIX B

PENALTY HEARING FOR FIRST DEGREE MURDER

N.R.S. 175.552 **Requirement; jury; panel of judges; evidence.**

Upon a finding that a defendant is guilty of murder of the first degree, the court shall conduct a separate penalty hearing to determine whether the defendant shall be sentenced to death or to life imprisonment with or without the possibility of parole. The hearing shall be conducted in the trial court before the trial jury, or before a panel of three district judges if the trial was without a jury, as soon as practicable. In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced. The state may introduce evidence of additional aggravating circumstances as set forth in N.R.S. 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing. (1977, p. 1543.)